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October 26, 2001

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: *Ex Parte* in CC Docket Nos. 96-45; 98-171; 90-571; 92-237; 99-200;  
95-116.

Dear Ms. Salas:

On August 8, 2001, representatives of WorldCom, Inc. ("WorldCom") met with the staff of the Common Carrier Bureau<sup>1</sup> to explain why the current revenue-based Universal Service Fund ("USF") contribution system is neither equitable nor competitively neutral, and cannot be sustained, and why it should be replaced by a connection- and capacity-based system. At the meeting, WorldCom described the specific interstate connection- and capacity-based contribution system that it proposed in its Comments and Reply Comments in this proceeding. During the course of the discussion, staff asked questions about the plan and how it would fit within the current legal framework. Staff requested that WorldCom submit for the record responses to these questions. WorldCom provides those responses in this *ex parte* submission.

Q1. Can the USF legally assess connections used entirely for data or enhanced/information services?

A1. This question must be addressed under two possible legal scenarios, depending on the outcome of the current appeal of the FCC's reciprocal compensation remand order, which identified "information access" as a category of interstate access. In either scenario, the Commission has the authority to assess connections used entirely for data or enhanced/information services.

Background:

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<sup>1</sup> *Ex parte* letter from Lori Wright, WorldCom, Inc., to Magalie Roman Salas, Secretary, FCC, dated August 9, 2001.

Since 1980, the FCC's rules have distinguished between basic (regulated) communications services and enhanced (unregulated) services. *See, e.g.*, Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II), Final Decision, 77 FCC 2d 384 (1980); 47 C.F.R. 64.702(a) (2000). The Telecommunications Act of 1996 largely preserves this dichotomy through the new phraseology of "telecommunications services" and "information services." 47 U.S.C. 153(46), 153(20). While the FCC possesses regulatory jurisdiction over basic/telecommunications services pursuant to Title II of the Communications Act, enhanced/information services fall outside the Commission's authority.

Section 254 of the Telecommunications Act provides that every telecommunications carrier that provides interstate telecommunications services is required to contribute to the federal universal service fund. 47 U.S.C. 254(d). In addition to this "mandatory authority," the Commission also possesses so-called "permissive authority" to require contributions from "any other provider of telecommunications ... if the public interest so requires." *Id.*

In its Report to Congress on universal service, the FCC endeavored to apply the Act's definitional concepts, and Section 254 itself, to existing types of telecommunications and information services. Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd 11501 (1998). The Commission explained that Internet access is an information service, which by definition is provided via telecommunications. Report to Congress, at para. 73. Because the information service provider ("ISP") is itself a user of telecommunications, telecommunications is merely an input in the provision of an information service. *Id.* at paras. 68-69, n.138. As the Commission noted, the provision of Internet access necessarily involves data transport elements, but the information service capabilities are inextricably intertwined with data transport. *Id.* at para. 80. In particular, Internet access providers lease lines from telecom providers, and conjoin that data transport with data processing, information provision, and other computer-mediated offerings, thereby creating an information service. *Id.* at para. 81. In other words, all information services ride on top of telecommunications (data) connections.

Thus, data services, such as frame relay, ATM, and ordinary dial-up connections to ISPs, constitute basic telecommunications services; these services clearly fall within Title II, and are subject to Section 254 obligations today. In contrast, the Internet and Internet access are information services; these services clearly fall outside Title II, and are not subject to Section 254 obligations today.

Under either outcome of the current appeal of the Commission's reciprocal compensation remand order, the Commission has the legal authority to impose a universal service fee on the data connections used to access the Internet.

#### Scenario 1

In the FCC's recent reciprocal compensation remand order, the Commission concluded that dial-up calls to ISPs (*i.e.*, the data transport facilities provided by ILECs and CLECs

to connect end users to ISPs) are interstate in nature, and in fact constitute “information access” under Section 251(g). Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, FCC 01-131, CC Docket Nos. 96-98, 99-68 (released April 27, 2001), at paras. 44-45. Information access essentially is the interstate access service that underlies the information service being provided. To the extent this order survives judicial review (WorldCom and other parties are pursuing appeals in the D.C. Circuit), the data connection underlying the information pathway between the end user and the ISP clearly is a regulated interstate telecom service, subject to Section 254(d). Thus, under the FCC’s own theory, the connection charge can be assessed on the jurisdictionally-interstate data communications connection.

## Scenario 2

Should the FCC’s remand order be reversed on jurisdictional grounds, it is highly likely that the Court will reject the Commission’s analysis of the “information access” category. If this occurs, WorldCom would advocate that the Commission adopt the “two-call” theory. Under that view of the jurisdictional nature of calls to ISPs, the data transport facilities provided to ISPs by ILECs and CLECs form the basis for a local telephone call that ends at the ISP. The Internet transport service provided by ISPs to the Internet is a second transmission, but one that constitutes an interstate information service (riding on top of interstate data communications facilities). In other words, there is a difference between the underlying telecommunications connection between the end user and the ISP (which is local), and the connection between the ISP and the Internet (which is largely, if not solely, interstate).

Although the loop used by an end user to connect to ISPs enables a jurisdictionally local service, that same loop also can (and in most cases will) be used to access long distance carriers and other providers of interstate telecommunications services. To that extent, if the loop is used for switched service, it is treated as 25 percent interstate under FCC rules. This is no different from any other loop used for switched service. If the loop is used for dedicated special access, it is treated as interstate as well. In either case, WorldCom’s proposed universal service assessment on connections could and would properly apply to the loop itself, rather than to the interstate information service (which is outside the statutory class of contributors to universal service).

- Q2. How would the FCC be sure that carriers did not exclude such data-only connections from their USAC filings?
- A2. The Commission and USAC would have to create reporting rules, with auditing features, analogous to those that exist today for revenues. Since all these connections would be subject to FCC authority, there would be no less incentive for carriers to obey these rules and make accurate filings than exists today.
- Q3. How would payphone operators be treated under the WorldCom plan?
- A3. Payphone operators would be treated as end users, as they are for access charge purposes. Payphone operators obtain payphone loops from incumbent local exchange carriers

("ILECs") or competitive local exchange carriers (CLECs"). These local exchange carriers, as the providers of the connection, would be assessed for that connection. The payphone connections should be assessed at the multi-line business rate, except for payphones designated as "public interest payphones," which should be treated analogously to Lifeline connections and exempted from the USF connection charge. FCC rule 64.1330 delegates to each State the responsibility for determining the need for public interest payphones in the state and for taking the steps necessary for assuring their continued existence. Such determinations were to be made by September 20, 1998, so states should have records of the payphones designated as public interest payphones. States also should already have processes in place for providers who seek to have their payphones designated public interest payphones.

- Q4. How would the WorldCom proposal handle the situation in which a carrier provides a customer a T-1 for just a single day for a promotion?
- A4. This is a subset of the question raised by SBC in its reply comments – how would variable bandwidth services be handled under the WorldCom proposal? Variable bandwidth service offerings allow a customer whose demand for bandwidth varies in a reasonably predictable fashion over a period of time – for example, a customer who can project peak bandwidth needs during the time it is offering a promotion – to efficiently meet its telecommunications needs. For example, with a variable bandwidth offering, a customer who typically requires only a few DS-0 circuits, but might need DS-1 capacity during a promotion, obtains its few DS-0 circuits plus a DS-1 switch port, so that it can add DS-0 circuits during its promotion and have the needed capacity on the switch. Under the WorldCom proposal, the carrier would be assessed for USF based on the switch port capacity – at a DS-1 level that is five times the basic business connection level. This would not represent a significant increase over the USF assessment for three or four DS-0 connections and thus is unlikely to dampen demand for variable bandwidth services. Customers are likely to view it as a small price to pay for the additional flexibility provided by variable bandwidth services.

It is likely that a customer who obtains a T-1 for a single day promotion would fit the profile of a variable bandwidth customer. It probably would have several DS-0 circuits on non-promotion days, so the increase in the USF assessment associated with guaranteed access to variable bandwidth would be minimal.

- Q5. Why shouldn't uncollectibles associated with the USF be considered just a cost of doing business that should be borne by the carrier rather than recovered in a universal service line item on the customer bill?
- A5. Uncollectibles associated with the USF are explicitly caused by the USF assessment; they are not costs of doing business that would exist in the absence of the USF assessment. It is appropriate for all costs associated with the USF to be recovered in a USF line item surcharge on customer bills. To the extent some customers do not pay that surcharge, but the carrier still has the responsibility to make full payment of its assessment to USAC, it is

appropriate for the carrier to recover those USF-caused costs by marking up the USF line item.

We hope that these responses will help you evaluate WorldCom's connection- and capacity-based assessment proposal. If you have any questions, please feel free to contact me.

Sincerely,

*Chuck Goldfarb*

Chuck Goldfarb

cc: Dorothy Attwood  
Carol Matthey  
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